

**EXHIBIT 5**  
**FILED UNDER SEAL**

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**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

GOOGLE LLC,

*Plaintiff,*

v.

SONOS, INC.,

*Defendant.*

Case No. 3:20-cv-06754-WHA  
Related to Case No. 3:21-cv-07559-WHA

**REBUTTAL EXPERT REPORT  
REGARDING DAMAGES**

**January 13, 2023**

Respectfully Submitted,



W. Christopher Bakewell

increases in subscriptions.<sup>1194</sup> However, Mr. Malackowski provided no evidence supporting this implication.

675. In this section of his report, Mr. Malackowski provided several quotes from one article.<sup>1195</sup> For instance, Mr. Malackowski cited the article for the statement that “Google is building an ecosystem in the smart home which “works better if you use more than one Google device.”<sup>1196</sup> Mr. Malackowski also cited this article for the proposition that “instead of just purchasing one speaker, the goal is to encourage users to purchase additional Google hardware products to expand their selection with integrated devices.”<sup>1197</sup> Mr. Malackowski disregarded, though, the overall point of the article, which the author summarized as follows:<sup>1198</sup>

**On their own, none of these new features are particularly revolutionary.** Taken together, they certainly don't add up to a compelling case for why somebody who is already enmeshed in Amazon's Alexa ecosystem should switch over.

676. This article does not even mention any of the accused features as being of significance. As I have now discussed at length, while Google and Sonos both have attractive products, they are aimed in many ways at different audiences. The patents-in-suit provide only a few of many features, and these three particular features are not the types of features that drive significant increases in demand. This provides countervailing evidence to Mr. Malackowski's claim that this is a matter where convoyed or collateral sales are a major consideration.

677. Mr. Malackowski also included a discussion of the Amazon Alexa which is incomplete and misleading. According to Mr. Malackowski, a November 2022 article noted that while Amazon's Echo product line is among the “best-selling items on Amazon...we want to make

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<sup>1194</sup> Malackowski Supplemental Report, p. 104.

<sup>1195</sup> Malackowski Supplemental Report, pp. 100 – 101, citing “The Google Assistant smart home ecosystem is slowly starting to take shape,” TheVerge.com, <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>

<sup>1196</sup> Malackowski Supplemental Report, pp. 100 – 101, citing “The Google Assistant smart home ecosystem is slowly starting to take shape,” TheVerge.com, <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>

<sup>1197</sup> Malackowski Supplemental Report, pp. 100 – 101, citing “The Google Assistant smart home ecosystem is slowly starting to take shape,” TheVerge.com, <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>

<sup>1198</sup> Bohn, D., “The Google Assistant smart home ecosystem is slowly starting to take shape,” TheVerge.com, <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>. Emphasis added.

<sup>1198</sup> Malackowski Supplemental Report, p. 103.

money when people use our devices, not when they buy our devices.”<sup>1199</sup> Mr. Malackowski disregarded the title of the article: “Amazon Alexa is a ‘colossal failure,’ on pace to lose \$10 billion this year.” The November 2022 article that Mr. Malackowski cited goes on to state that “(t)hat plan never really materialized, though.”<sup>1200</sup>

678. Mr. Malackowski disregarded several publicly available reports indicating that the investments made related to the Google Assistant and Amazon Alexa products have generally not paid off.<sup>1201</sup> An October 2018 survey titled “Smart Speaker User Survey: Questions for Sonos,” found that the “Google Home device has the lowest repeat purchase rate of major devices.”<sup>1202</sup>
679. Mr. Malackowski disregarded that Google is known for its ability to innovate, and an entrepreneurial spirit would mean that some products may simply be unsuccessful as a result.<sup>1203</sup> This spirit of innovation comes with a long history of rebranded and discontinued products and services, numbering in the hundreds.<sup>1204</sup>

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<sup>1199</sup> Malackowski Supplemental Report, p. 104, citing “Amazon Alexa is a ‘colossal failure,’ on pace to lose \$10 billion this year,” *arstechnica*, <https://arstechnica.com/gadgets/2022/11/amazon-alexa-is-a-colossal-failure-on-pace-to-lose-10-billion-this-year/>.

<sup>1200</sup> “Amazon Alexa Is A ‘Colossal Failure,’ On Pace To Lose \$10 Billion This Year,” *Ars Technica*, November 21, 2022 (accessed: <https://arstechnica.com/gadgets/2022/11/amazon-alexa-is-a-colossal-failure-on-pace-to-lose-10-billion-this-year/>). This article also stated that “It’s not like Alexa plays ad breaks after you use it, so the hope was that people would buy things on Amazon via their voice. Not many people want to trust an AI with spending their money or buying an item without seeing a picture or reading reviews. The report says that by year four of the Alexa experiment, “Alexa was getting a billion interactions a week, but most of those conversations were trivial commands to play music or ask about the weather. Those questions aren’t monetizable.”

<sup>1201</sup> For example, see: “Amazon Alexa Is A ‘Colossal Failure,’ On Pace To Los \$10 Billion This Year,” *Ars Technica*, November 21, 2022 (accessed: <https://arstechnica.com/gadgets/2022/11/amazon-alexa-is-a-colossal-failure-on-pace-to-lose-10-billion-this-year/>); “Google ‘Doubles Down’ On Pixel Hardware, Cuts Google Assistant Support: Is Google Assistant In Trouble? It’s True That It Doesn’t Make Any Money,” *Ars Technica*, October 18, 2022 (accessed: <https://arstechnica.com/gadgets/2022/10/report-google-doubles-down-on-pixel-hardware-cuts-google-assistant-support/>); “Amazon Alexa Is A Money Loser As AI, NLU, And Conversational Teams Heavily Hit By Layoffs,” *9to5Google*, November 19, 2022 (accessed: <https://9to5google.com/2022/11/19/amazon-alexa-layoffs/>); “Alexa Might Not Get Much Smarter Than It Is Right Now,” *Wired*, November 12, 2022 (accessed: <https://www.wired.com/story/amazon-alexa-reportedly-losing-money/>); “Alexa, Why Are You Losing So Much Money,” *Popular Science*, November 23, 2022 (accessed: <https://www.popsoci.com/technology/amazon-alexa-lose-money/>).

<sup>1202</sup> SONOS-SVG2-00063422-438 at 428. I also understand from Chris Chan, Senior Product Manager at Google, that Google does not set its retail prices below its bill of material cost. *See* Deposition of Chris Chan, November 29, 2022, p. 124.

<sup>1203</sup> “Google: Moonshots That Can Change An Industry Paradigm,” *Seeking Alpha*, March 23, 2022 (accessed: <https://seekingalpha.com/article/4497305-google-moonshots-that-can-change-industry-paradigm>).

<sup>1204</sup> “Killed By Google,” (accessed: <https://killedbygoogle.com/>). In fact, it wasn’t until 2020 that the Nest suite of products was moved from the “Other Bets” line item of Alphabet financial statements.

680. Nevertheless, Mr. Malackowski claimed that “Google’s infringement of Sonos’s patented inventions has helped and will help Google generate significant revenue from driving its users to make purchases such as streaming music subscriptions and retail purchases via and for use with Google’s Cast-enabled media players.”<sup>1205</sup> Mr. Malackowski offers no valid support for this, either.
681. Mr. Malackowski claimed that a NPR “smart speaker” survey found that 28% of survey respondents agreed that “[g]etting [a] Smart Speaker led [them] to pay for a music service subscription.”<sup>1206</sup> According to Mr. Malackowski, Google offers two such subscriptions: Google Play Music and YouTube Music.<sup>1207</sup> Mr. Malackowski also stated that the NPR survey “also found that 26% of respondents use their smart speakers ‘regularly’ to ‘add [items] to shopping list.’”<sup>1208</sup> However, these citations are not specific to the technology of patents-in-suit. For example, shopping lists are different technologies, and Google Play Music and YouTube Music technologies that provide access to valuable content. This information shows that there are other aspects of the accused products—not the patented technologies—that are of interest to consumers.
682. Mr. Malackowski disregarded evidence from an article in his report that stated “...you can use Google Assistant on an iPhone, and Google Home works well with third-party products like Ring doorbells or Hue bulbs or Roomba. And as long as we’re being clear: never underestimate either Google or the smart home’s proclivity for letting things become slowly fragmented.”<sup>1209</sup> Consumers can even mix and match technologies for what some consider to be a superior smart

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<sup>1205</sup> Malackowski Supplemental Report, p. 104.

<sup>1206</sup> Malackowski Supplemental Report, p. 104, citing SONOS-SVG2-00042345-383 at 359; SONOS-SVG2-00042337-344 at 342

<sup>1207</sup> Malackowski Supplemental Report, p. 104, citing SONOS-SVG2-00042345-383 at 359; SONOS-SVG2-00042337-344 at 342

<sup>1208</sup> Malackowski Supplemental Report, p. 104, citing SONOS-SVG2-00042345-383 at 359; SONOS-SVG2-00042337-344 at 342

<sup>1209</sup> “The Google Assistant Smart Home Ecosystem Is Slowly Starting To Take Shape,” The Verge, November 14, 2018 (accessed: <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>).

home experience.<sup>1210</sup> This further contradicts Mr. Malackowski's statements that consumers would limit themselves to just one company's devices.

683. Yet another example is Wired Magazine's *Ultimate Guide to Setting Up Your Smart Home*, which states that "[b]efore you start shopping for devices, decide which ecosystem works best for you."<sup>1211</sup> Mr. Malackowski does not consider that a company's ecosystem can drive the purchase of a smart speaker; this is not specific to the patents-in-suit, either.

684. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] But this relates to Google TV.<sup>1214</sup> Google TV is different than the accused products and the patents-in-suit.<sup>1215</sup>

685. [REDACTED]  
[REDACTED]  
[REDACTED] It is unclear why Mr. Malackowski believes this has to do with the patents-in-suit; this article relates to Google TV. Casting could drive users away from Google TV, which further discredits his

<sup>1210</sup> For example, Matter is a new "open source interoperability standard" for smart homes that is making headway with Google, Amazon, and Apple all signing on as members. "Matter promises to enable different devices and ecosystems to play nicely. Device manufacturers will comply to the Matter standard to ensure their devices are compatible with smart home and voice services such as Amazon's Alexa, Apple's Siri, Google's Assistant, and others. For folks building a smart home, Matter should enable you to buy any device and use the voice assistant or platform you prefer to control it." See "What's the Matter? We Explain the New Smart Home Standard," Wired, April 3, 2022 (accessed: <https://www.wired.com/story/what-is-matter/>). See also "Can Google Home and Alexa Work Together?" LifeWire, January 26, 2022 (accessed: <https://www.lifewire.com/use-google-home-and-alexa-together-5205343>); "The Google Assistant Smart Home Ecosystem Is Slowly Starting To Take Shape," The Verge, November 14, 2018 (accessed: <https://www.theverge.com/2018/11/14/18093872/google-assistant-smart-home-broadcast-reply-routines>).

<sup>1211</sup> "The Ultimate Guide to Setting Up Your Smart Home," Wired, July 20, 2021 (accessed: <https://www.wired.com/story/how-to-set-up-smart-home/>).

<sup>1212</sup> Malackowski Supplemental Report, p. 102, citing for example: GOOG-SONOSNDCA-00115771-813 at 775, 780; GOOG-SONOSNDCA-00115771-813 at 775; GOOG-SONOSNDCA-00115896-913 at 897, 898, 911, 913.

<sup>1213</sup> Malackowski Supplemental Report, p. 105.

<sup>1214</sup> GOOG-SONOSNDCA-00115896-913 at 897, 911

<sup>1215</sup> "Google TV," Google website, (accessed: <https://tv.google/>).

<sup>1216</sup> Malackowski Supplemental Report, p. 106.